Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 2000

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Jeremiah W. (Jay) Nixon, Attorney General,
State of Missouri, et al.,
Petitioners,

v.

Merrill Lynch, Pierce, Fenner & Smith, Inc.,
Respondent.

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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether, based on the Federal Arbitration Act, 9 U.S.C. §1, a United States district court has subject matter jurisdiction over a claim that a state civil rights agency cannot enforce state anti-discrimination laws when the allegedly discriminatory acts were the subject of arbitration between an employer and its employee?

2. Whether, based on the Federal Arbitration Act, 9 U.S.C. §1, an employee's arbitration of an employment-related dispute with an employer, done pursuant to an industry-wide requirement that employees in that field agree to arbitration, bars a state civil rights enforcement agency, as the plaintiff in an enforcement action against the employer, from obtaining victim-specific remedies for discrimination against the employee, such as back pay and damages?

## PARTIES TO THE PROCEEDING

Petitioners are Jeremiah W. (Jay) Nixon, Attorney General for the State of Missouri; Assistant Attorney General Keith D. Halcomb; Missouri Commission on Human Rights members Gerald P. Greiman, Geraldine Johnson, Sterling Adams, and Nancy Reynolds, and the Commission's Executive Director, Donna Cavitte.[1]

Respondent is Merrill Lynch, Pierce, Fenner & Smith, Inc.

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[1] The named complainant in the underlying commission proceeding, Anthony Hoskins, is not a party here nor in that proceeding.

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# PETITION FOR WRIT OF CERTIORARI

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## OPINIONS BELOW

The opinion of the court of appeals (Appendix [App.] App. A-15), entered on April 24, 2000, is reported at 210 F.3d 814. The decision of the district court granting in part Merrill Lynch's motion for a temporary restraining order, permanent injunction and other injunctive relief (App. A-28) is not reported.

## JURISDICTION

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit entered its judgment on April 24, 2000. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1)(1999) and pursuant to Supreme Court Rule 14. Petitioners were granted an extension of time until August 25, 2000, in which to file their petition for certiorari.

## STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Missouri Human Rights Act, Mo. Rev. Stat. § 213, et seq., (1994), and the Federal Arbitration Act, 9 U.S.C. § 1 are reproduced in the Appendix, *infra*, App. A-2 — A-13, and App. A-14.

## STATEMENT OF THE CASE –

Petitioners (defendants at the district court) are all persons associated with the Missouri Commission on Human rights ("Commission")[2] and are involved in a case, *State of*

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[2] Jay Nixon is the Attorney General for the State of Missouri and is charged by statute with enforcing the Missouri Human Rights Act. Mo. Rev. Stat. §§ 213.075.7, 213.126 (1994). Keith D. Halcomb is an Assistant Attorney General for the State of Missouri and has been counsel for the Commission in this matter since it was originally set for hearing on July 8, 1997. Gerald P. Greiman was the Chairperson of the Commission who made the decision that this matter warranted a public hearing under Missouri law. *Id.* § 213.075.5. Donna Cavitte is the Executive Director of the Commission. Geraldine Johnson, Sterling Adams, and Nancy Reynolds are all Commissioners, appointed by the

*Missouri ex rel. Anthony Hoskins v. Merrill Lynch,* currently pending before the Missouri Commission on Human Rights. The Missouri Human Rights Act "authorizes the Missouri Commission on Human Rights 'to take such affirmative action [that] will implement the purpose of [the Human Rights Act],' including an award of actual damages." *Van den Berk v. Missouri Comm'n on Human Rights Act,* 2000 WL 1017024, *6 (Mo. App. E.D. 2000), quoting Mo. Rev. Stat. § 213.075.11(1), and citing *Missouri Comm'n on Human Rights v. Red Dragon Restaurant, Inc.,* 991 S.W.2d 161, 171 (Mo. App. W.D. 1999). An award of damages "is justified to promote the remedial purposes of the Missouri Human Rights Act." *Van den Berk,* at *6. The decision of the U.S. Court of Appeals for the Eighth Circuit effectively prevents the Commission from fully enforcing the Missouri Human Rights Act.

Anthony Hoskins, an African-American stock broker, was employed by respondent Merrill, Lynch, Pierce, Fenner & Smith, Inc. As a broker, Hoskins traded stocks on the New York Stock Exchange (NYSE). Hoskins was required to sign a standardized registration form, called the U-4 Form, which was generally required of all employees in the securities industry. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 170 F.3d 1, 4-5 (1st Cir. 1999).[3]

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Governor of Missouri, who participated in the Commission's determination that Merrill Lynch's motion to dismiss filed with the Commission should be denied. *Id.* §§ 213.020.1 and 213.075.14.

[3] Form U-4 originated at the Securities and Exchange Commission (SEC). A copy of the current Form U-4 can be found on the National Association of Securities Dealers (NASD) web site, www.nasdr.com/4700.htm, which shows that a completed, signed Form U-4 is required for NASD

"[S]igning the U-4 Form [is] a prerequisite for employment as a securities broker." *Id.*, at 17. Merrill Lynch admitted in *Rosenberg* that "it would not 'employ or promote financial consultants who refuse to sign the Form U-4.'" *Id.*, at 17 (quotations in the original). Form U-4 includes a clause requiring that Hoskins submit any employment disputes to arbitration. App. A-6; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon, et al.*, 210 F.3d 814, 816 (8th Cir. 2000).

After his termination, Hoskins submitted claims of discrimination to a National Association of Securities Dealers arbitration panel. He claimed that he was terminated because of his race. The panel found Merrill Lynch did not discriminate against him. App. A-16 — A-17.

Hoskins also filed a complaint with the Missouri Commission on Human Rights, asserting that Merrill Lynch had violated the Missouri Human Rights Act. The Commission investigated Hoskins's complaint and, after the arbitration decision, determined that there was probable cause to believe that Hoskins was terminated because of his race. App. A-29. The Commission thus brought charges in accordance with the Missouri Human Rights Act, Mo. Rev. Stat. § 213.075.5.[4] App. A-9, A-17. The Commission cited as authority only the Missouri Act; it did not raise any federal claims against Merrill Lynch. App. A-17.

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membership.

[4] The Commission alleged that Merrill Lynch discriminated based on race against Hoskins and other, unnamed employees in respect to discharge, compensation, terms, conditions, or privileges of employment. The Commission sought relief for Hoskins and other employees who were illegally discriminated against.

Merrill Lynch asked the Commission to dismiss its charges. Merrill Lynch claimed that because the Federal Arbitration Act preempts state anti-discrimination law, the Missouri Human Rights Act's grant of authority to the Commission to proceed on Hoskins' claim violates the Supremacy Clause, U.S. Const. art VI, Cl. 2.[5] The Commission denied Merrill Lynch's motion to dismiss.

Rather than pursue its defenses in a state forum, Merrill Lynch asked the U.S. District Court for the Eastern District of Missouri to enjoin Petitioners from pursuing the state action. Prior to the Commission being able to conduct any meaningful discovery, the district court found the reasoning in *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2nd Cir. 1998), persuasive, and ruled that Merrill Lynch's request for injunctive relief should be granted as to damages based on individuals' claims. App. A-33 — A-34, A-38. The court enjoined Petitioners from pursuing monetary damages for Hoskins. App. A-38. The district court's order permitted the Commission to proceed against Merrill Lynch for injunctive relief. *Id.* The district court rejected the Petitioners' argument that a federal court did not have subject matter jurisdiction to hear this matter. App. A-33.

Petitioners appealed to the United States Eighth Circuit Court of Appeals, which affirmed the district court's

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[5] Before the Commission and the district court, Merrill Lynch also asserted collateral estoppel, claiming that the prior arbitration decision barred the Commission from litigating the issue of whether Merrill Lynch discriminated against Hoskins even though the Commission was not a party to the arbitration or the arbitration agreement. Merrill Lynch did not assert such claim preclusion and collateral estoppel arguments at the Eighth Circuit.

decision.[6] The Eighth Circuit held that the Arbitration Act creates a federal right for employers, and that the actions of the Commission interfered with that right. App. A-18. The Eighth Circuit reasoned that "the utility of arbitration would be drastically reduced" if employees were allowed to relitigate arbitration cases. App. A-20. The court held that as monetary remedies are highly individual in nature, when the Commission sought such relief based on Hoskins's claim, it was acting as his representative. App. A-21. The Commission was still permitted to seek injunctive relief. App. A-25.

## REASONS FOR GRANTING THIS WRIT

### I. The Eighth Circuit lacked jurisdiction to decide the significant legal questions presented here.

The Eighth Circuit failed to fully and properly address a critical issue: the subject matter jurisdiction of the federal courts. In that respect, the petition should be granted and the decision summarily reversed.

To bring its claim in federal court, both the Eighth Circuit and Merrill Lynch understood that Merrill Lynch was required to find some "federal question." App. A-18. The Eighth Circuit relied on *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), for the proposition that "federal courts have jurisdiction to enjoin state officials from interfering with federal rights." 463 U.S. at 96 n. 14. App. A-18. The Eighth Circuit found that Merrill Lynch had an independent,

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[6] The Eighth Circuit did reverse the district in holding that the Commission was entitled to be dismissed from the action based on Eleventh Amendment immunity, leaving only individual state officials as defendants. App. A-23 — A-24.

federal right under the Arbitration Act. *Id.* But reliance on *Shaw* fails where there is no identifiable federal right. That the Arbitration Act does not grant an independent federal right, under the present circumstances, is clear from many decisions of this Court.

This Court has consistently held that the Arbitration Act only guarantees the enforceability of private contracts. The Act's "purpose was to place an arbitration agreement 'upon the same footing as other contracts, where it belongs.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). *See also Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 474 (1989) (same). It was "motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." *Dean Witter Reynolds*, 470 U.S. at 220. "Having made the bargain to arbitrate, the party should be held to it." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

But the Commission was not a party to the employee's agreement to arbitrate. Even if the employee agreed to binding arbitration, no right under the agreement can be asserted against the Commission. The Commission is not bound thereby. Therefore, no right is secured by the Arbitration Act insofar as the Commission is concerned. Indeed, in *Dean Witter Reynolds* this Court treated the possible preclusive effect of an arbitration decision as a matter separate from the Arbitration Act analysis. 470 U.S. at 223.

Moreover, even in cases involving arbitration participants, this Court has held that the Arbitration Act "does not create any independent federal question jurisdiction." *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1,

25 n. 32 (1983). Only when a federal court has jurisdiction of the underlying dispute does the Arbitration Act apply. *Id.* But the federal court had no independent basis for jurisdiction of the underlying dispute in this case. Merrill Lynch could not rely on the underlying civil rights law, as could the employer fighting an action by the EEOC under federal law. Unlike *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *petition for cert. filed*, 68 USLW 3726 (U.S. May 15, 2000)(No. 99-1823), the proceeding that Merrill Lynch sought to enjoin was in a state forum. The Commission's complaint was based solely on state law and involved a state agency (not a federal defendant) that had neither waived its Eleventh Amendment immunity nor had such immunity explicitly, validly abrogated.

In *Volt Information Sciences, Inc.*, 489 U.S. at 479, this Court held that an agreement to arbitrate by different rules than contained in the Arbitration Act does not constitute a violation thereof. Since the purpose of the Act is to protect the right to contract, it is not violated by a voluntary contract to follow arbitration rules other than those of the Act itself. The Act is even less applicable when a party such as the Commission has made no agreement to arbitrate.

The effect of an arbitration agreement or an arbitration decision — the only issue Merrill Lynch raised below — is not controlled by the Arbitration Act as it relates to nonparticipants in the agreement or arbitration. Any possible effect, therefore, does not present a federal question and thus cannot be the basis for federal court jurisdiction.

This is true regardless of whether Merrill Lynch, rather than asserting an affirmative federal right, instead poses the Arbitration Act as a federal defense. It is the nature of the state action, not the possible federal defenses, that determines whether there is federal question jurisdiction.

*Public Service Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237 (1952). The Eighth Circuit improperly ignored that rule when it concluded that it had jurisdiction to rule on Merrill Lynch's claim of preclusion.

If the arbitration in this case has some binding effect on the Commission, it must be on some basis other than the Arbitration Act. Thus, Merrill Lynch's citation to the Act did not establish federal question jurisdiction and the Eighth Circuit's decision should be summarily reversed.

## II. The Eighth Circuit's opinion deepens the split among the circuits and exacerbates the fractured, confusing analyses the circuits employed.

Obviously the Eighth Circuit's decision conflicts with the decision of the Ninth Circuit in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (1999), *cert. granted*, 120 S.Ct. 2004 (2000)(No. 99-1379),[7] where that court held that the Arbitration Act does not even apply to employment contracts — a holding that would, if upheld, implicitly eliminate the basis for the Eighth Circuit's decision here. But as the

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[7] The Ninth Circuit, in both *Circuit City* cases, has declined to extend the application of the Federal Arbitration Act to employment contracts. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071-72 (9th Cir. 1999), *cert. granted*, 120 S.Ct. 2004 (2000) (No. 99-1379); *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131, 1133 (9th Cir. 1999), *petition for cert. filed*, 68 USLW 3536 (U.S. Feb. 16, 2000) (No. 99-1378). The Eighth Circuit here joins the Fourth and other circuits holding to the contrary. *See EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *petition for cert. filed*, 68 USLW 3726 (U.S. May 15, 2000) (No. 99-1823).

petition for writ of certiorari in the *Circuit City* case pointed out, the Ninth Circuit's decision conflicts with decisions in numerous circuits. The decision of the Eighth Circuit to join the majority side in that conflict might merit a grant and remand for consideration in light of *Circuit City*, but it would not merit separate consideration of this case. What merits consideration by this Court is the Eighth Circuit's distinctive entry into the morass of conflicting views as to how the Arbitration Act, once applied to employment contracts, affects the ability of government agencies to enforce the laws attacking employment discrimination.

In another case in which a petition for writ of certiorari is pending, the Fourth Circuit, in a decision at odds with the Sixth and Ninth Circuits, held that a private agreement to arbitrate prevented the EEOC from seeking any individual relief, monetary or injunctive. ***EEOC v. Waffle House, Inc.***, 193 F.3d at 812. The Fourth Circuit concluded that the EEOC must bow to an employee's prior agreement to arbitrate, even if the EEOC was not a party to the agreement. *Id.* at 813. The Eighth Circuit's decision here generally follows the Fourth Circuit's decision in ***Waffle House***, thus providing further evidence of the conflict identified by the EEOC in its petition for writ of certiorari in that case.

But in addition to the jurisdictional question discussed above, the issues raised by the Eighth Circuit's decision go beyond those raised in ***Waffle House*** in at least three respects that militate in favor of granting the petition here, regardless of the Court's action in that case. First, the employee here was not just subject to an arbitration agreement; he had completed (and failed in) arbitration. Second, the claim was asserted under state, not under federal law, by a state, and not by a federal agency. And third, the claim arose with regard to a class of employees, found in every state, who are literally

*required* to sign an arbitration agreement to remain in their chosen profession.

In the narrower *Waffle House* case, the Fourth Circuit held that "[w]hen the EEOC seeks 'make whole' relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed." *Id.* at 812. The EEOC would not be allowed to proceed with its case unless it sought class wide equitable relief, an issue the Fourth Circuit left the district court to decide. *Id.* at 813, n. 3. The Eighth Circuit applied a comparable rule here to a state agency with a role similar to that of the EEOC.

The Second Circuit has taken a course similar to that of the Fourth, holding that a private agreement to arbitrate barred the EEOC from seeking monetary damages based on individual claims. *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 300-01 (2nd Cir. 1998). The Second Circuit based its decision on the "liberal federal policy favoring arbitration agreements." *Id.* at 302, citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).[8]

But the Sixth Circuit took a fundamentally different approach. *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 466 (6th Cir. 1999). The Sixth Circuit held that the Arbitration Act does not prohibit the EEOC from pursuing both monetary and injunctive relief on behalf of aggrieved individuals. *Id.* In the Sixth Circuit case, all applicants had to sign a pre-employment agreement requiring arbitration of any employment disputes. *Id.*, at 452. An employee, alleging she was denied a promotion based on her

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[8] As the employer in *Kidder* had ceased operations, the EEOC stipulated to the district court that it no longer was seeking injunctive relief. *Kidder*, 156 F.3d at 300.

race, filed a complaint against Frank's Nursery with the EEOC.[9] *Id.*, at 453. After investigating the claim, the EEOC filed suit in federal court alleging that Frank's Nursery discriminated based on race. *Id.* In its suit, the EEOC sought both injunctive and monetary relief. *Id.*

The Sixth Circuit, applying "general principles of contract law," held that the complaining employee could not waive the statutory right of a governmental entity. *Id.*, at 459. Because the EEOC never agreed to arbitrate, it was not bound by the provisions of the arbitration agreement entered into by the employee. *Id.* The EEOC was thus allowed to seek both individual monetary and injunctive damages. In effect, the Sixth Circuit held that governmental agencies cannot be bound by individual decisions to arbitrate. The Sixth Circuit thus recognized for civil rights agencies an independent role — even as to *post hoc* relief — that the Fourth and Eighth Circuits denied.

Including the Ninth Circuit's decision on the preliminary question, five circuits have at least indirectly addressed the issue of whether the Arbitration Act prevents governmental entities from pursuing civil rights remedies, and four have issued different and wide ranging decisions pertaining specifically to the ability of civil rights agencies to pursue remedies despite private arbitration. Thus, today the EEOC and state civil rights agencies are empowered in the Sixth and Ninth Circuits, and rendered impotent in the Second, Fourth, and Eighth. In two circuits, the agencies have independent enforcement authority that permits them to prevent employers from taking advantage of the arbitration system to reduce the price they must pay for civil rights violations; in three others, the agencies can say nothing more

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[9] The employee never submitted her claims to arbitration.

than, "Don't do it again." That conflict, which only this Court can eliminate, creates confusion, chaos, and inequity.

The confusion, chaos, and inequity will grow as the use of arbitration agreements grows. In fact, employers are increasingly using arbitration agreements as a pre-condition to employment. *See Rosenberg v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 995 F. Supp. 190, 199 n. 12 (D. Mass. 1998)(citing studies showing increase in pre-dispute employment arbitration agreements), *aff'd*, 170 F.3d 1 (1st Cir. 1999). If the decisions of the Second, Fourth, and Eighth Circuits remain undisturbed, other employers will see arbitration agreements as a way of substantially eliminating the possibility of civil rights enforcement by the government. It is easy to imagine situations outside the employment arena where arbitration agreements might be used. Real estate agents or leasing agents might start having clients or potential tenants sign arbitration agreements, whereby any claims of discrimination in housing will have to be submitted to binding arbitration. Hotels, airlines, and travel agents, as well as other public accommodations, could soon follow such a lead, requiring arbitration agreements in their own form contracts.

Thus it might not be much longer before the EEOC, the Commission, and, for example, the U.S. Department of Housing and Urban Development have their oversight of the employment, public accommodation, and housing fields severely restricted as arbitration agreements become more and more prevalent. Such a court-imposed restriction on civil rights agencies' powers would thwart the intent of Congress and the Missouri legislature that these agencies work to eradicate discrimination in the United States and Missouri.

## III. This case presents important issues that merit review regardless of this Court's disposition of *Circuit City* and *Waffle House*.

*Circuit City* raises the critical and basic issue of the application of the Arbitration Act to employment contracts. If the Ninth Circuit is affirmed, that case may well preempt the issues presented here and in *Waffle House*. But if it is reversed, the conflicts identified in these government enforcement cases will persist. If the Court grants the EEOC's petition and decides *Waffle House*, it will necessarily resolve some aspects of the conflict among the Second, Fourth, Sixth, and Eighth Circuits. Hearing this case, the Court could fill in detail that the narrower *Waffle House* case would not permit. In addition to the jurisdictional issue discussed above, this case goes beyond *Waffle House* in three significant respects:

1. The *Waffle House* employee was subject to an arbitration agreement, but did not pursue arbitration as that agreement required. Here, by contrast, the employee pursued the only option the agreement gave him. So *Waffle House* addresses the scope of the agency's authority when an employee *could have* pursued arbitration; this case addresses the scope of the agency's authority when the employee *actually pursued* arbitration. Were this Court to grant the petition in *Waffle House* and reverse, employers such as Merrill Lynch would argue that the decision is limited to instances where the employee elected not to arbitrate, and that agencies still cannot pursue relief when the employee complied with the contractual agreement to arbitrate.

The distinction should not amount to a dispositive defense for employers in government agency civil rights enforcement proceedings. It is the employers who insist on the contractual arrangement to arbitrate as a condition of

employment. And not only is a government agency not a party to such a private contract, an agency's civil rights enforcement efforts are not served by, nor should they be conditioned on, requiring an individual employee to ignore a contractual agreement with his or her employer.

2. This case also raises issues of sovereignty. *Waffle House* arose from an enforcement action by the EEOC of the Americans with Disabilities Act of 1990, and the Civil Rights Act of 1991. 193 F.3d 805, 807. But this case arose from enforcement action by a state agency under state law: The Missouri Commission on Human Rights found probable cause that Merrill Lynch terminated Hoskins because of his race, and determined that it would bring a state action against Merrill Lynch for violation of the Missouri Human Rights Act. Mo. Rev. Stat. § 213, et seq.

While the Commission brought the state action against Merrill Lynch based on Hoskins' complaint of discrimination, the Commission is not merely a surrogate for individual victims of discrimination. The Commission is empowered "to eliminate and prevent discrimination because of race." Mo. Rev. Stat. § 213.030(1). This case, unlike *Waffle House*, raises issues of state authority and sovereignty not present in *Waffle House* or *Circuit City*. The Commission represents the interests of the state, something a private individual cannot do. *Waffle House*, 193 F.3d at 810. The Commission (in this respect, again, like the EEOC) never ceases to represent the state's interests even while proceeding on an individual's complaint of discrimination.[10] *See Frank's*

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[10] The Missouri Human Rights Act is explicitly made part of the enforcement scheme of Title VII, and therefore, the Commission acts on the state level in a capacity similar to that of the EEOC. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997).

*Nursery*, 177 F.3d at 458; *van den Berk*, 2000 WL 1017024, at *6. Thus this case is an attack not just on the availability of relief for Hoskins, but on the authority of the states.

Limiting the ability of the Commission and similar agencies in other states to pursue monetary relief would negatively impact the ability of those states to protect their citizens against unlawful discrimination. *Id.*, at 466. "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albemarle Paper v. Moody*, 422 U.S. 405, 417 (1975). It is the prospect of having to pay back wages that in many cases "'provides the spur or catalyst'" for change in discriminatory employment practices. *Id.*, *quoting U.S. v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973) (also describing back pay awards as playing "a crucial role in the remedial process"). The Missouri legislature recognized that a potential award of back pay is an important facet of its overall plan to eradicate racial discrimination in Missouri, and gave the Commission the authority to award such damages. Mo. Rev. Stat. § 213.075.11(1).

As part of the sovereignty question, this case adds an Eleventh Amendment immunity issue to those presented in *Circuit City* and *Waffle House*. The State of Missouri has not waived its Eleventh Amendment immunity from suit in federal court in cases where parties wish to enjoin Missouri's agencies and officials from pursuing enforcement of the state's civil rights laws. No party in *Circuit City* or *Waffle House* can raise Eleventh Amendment immunity from suit in such cases, as the Commission did below.

Not only has Missouri not waived its immunity, Congress made no effort in 1925 to abrogate the States' immunity when it passed the Arbitration Act. The lack of waiver is all the more stark in the context of this case,

brought against the Commission and state officials in federal court by virtue of an Arbitration Act defense, because the Arbitration Act is not a jurisdictional statute. It

> is something of an anomaly in the field of federal-court jurisdiction. It creates a federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal question jurisdiction .... Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other basis for federal jurisdiction.

*Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). Not only is there no Eleventh Amendment waiver whatsoever — whether by Missouri itself or by Congress — the Commission and Missouri officials have been haled into federal court by a statute that this Court declared some 17 years ago does not even create federal question jurisdiction.

3. Finally, this case is based on an arbitration agreement that is not unique to one employer, but that covers an entire profession. Though the employee in *Waffle House* was required to sign an arbitration agreement in order to work for one employer, presumably he could have found similar work elsewhere, and thus could have either gone to an employer who did not require arbitration, or negotiated to eliminate the arbitration clause from the agreement with Waffle House. But Hoskins, faced with an industry-wide broker arbitration requirement, had no such choice. *See* note 2 and accompanying text, *infra*; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

Perhaps in response to a future reversal of *Waffle House*, an employer would argue that the employee had a choice, and that choice somehow affected the agency's ability to proceed. But if the Eighth Circuit is right, then the Missouri Commission on Human Rights and the EEOC have no ability to address even pervasive discrimination against brokers — except, again, through "Don't do it again" injunctions.

## IV. The decision below is inconsistent with decisions of this Court.

The decision of the Eighth Circuit barring the Commission from seeking relief based on an arbitration proceeding to which it was not and could not be a party is contrary not just to decisions in other circuits, but to decisions of this Court.

1. The conflict is apparent, first, when the Eighth Circuit's holding is compared to cases in which employees, after arbitration, themselves asserted statutory claims. Most notable is *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), where this Court held that an individual was entitled to a trial de novo of his Title VII claim despite an adverse arbitral decision. Thus the Court rejected a premise implicit in the Eighth Circuit's holding: that the mere fact that arbitration has taken place by itself bars subsequent litigation.

Title VII allows parallel or overlapping remedies for employment discrimination. The "submission of a claim in one forum does not preclude a later submission to another." 415 U.S. at 47-48. These other forums can include independent pursuit of rights under other applicable state statues. 415 U.S. at 48. In the instant case, the Commission is protecting rights and pursuing remedies afforded by such a state statute.

Apart from Congress' intent in enacting Title VII, this Court's conclusion was based on the separate nature of the rights asserted in the arbitration and judicial proceeding. The arbitration in *Gardner-Denver* asserted a violation of the nondiscrimination clause of a collective bargaining agreement. But the lawsuit asserted independent statutory rights under Title VII. This Court found no inconsistency in allowing each to be asserted in the appropriate forum because "[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence." 415 U.S. at 50.

Similarly, the rights asserted in this case are distinctly separate, albeit for a somewhat different reason. In *Gardner-Denver,* the same party asserted different claims. But here, different parties assert different claims. An employee's personal interest in being free from discrimination is distinct from the public's interest, as represented by the Commission, that employment in the State of Missouri is free from discrimination. Although both are based upon a prohibition of racial discrimination in employment, they "have legally independent origins." 415 U.S. at 52. Even if violated by the same factual occurrence, each claim should be equally available to the appropriate party and determined in its respective forum.

Thus, the rationale of this Court's decision in *Gardner-Denver* leads to the conclusion that the Eighth Circuit's decision was erroneous. But the decision below is also inconsistent with this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). There this Court held that an employee who had entered into an arbitration agreement could be required to assert his Age Discrimination in Employment Act (ADEA) claim through arbitration, rather than federal court. This Court rejected an argument that arbitration would undermine the role of the

EEOC, because "[a]n individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." 500 U.S. at 28. The analysis implies that the EEOC can pursue a charge however it sees fit, seeking whatever remedies are statutorily available to it. Likewise, an employee subject to an arbitration agreement may file a charge with the Commission, and the Commission may exercise its statutory authority. The right to file a charge would be hollow if agencies such as the EEOC and the Commission could do nothing for the claimant if the arbitration was unsuccessful.

This Court has refused to give preclusive effect to arbitration decisions in other contexts. For example, prior arbitration does not bar a suit pursuant to 42 U.S.C. § 1983. *McDonald v. City of West Branch, Michigan,* 466 U.S. 284 (1984). Unsuccessful arbitration does not bar a subsequent suit alleging a violation of the minimum wage provisions of the Fair Labor Standards Act. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). Indeed, this Court has indicated that "the preclusive effect of arbitration proceedings is significantly less well settled than the lower court opinions might suggest." *Dean Witter Reynolds*, 470 U.S. at 222. By giving the arbitration a preclusive effect in the instant case, the court of appeals settled the question in a fashion contrary to these decisions of this Court.

Again, if agreements to arbitrate, or actual arbitration, bar agencies such as the Commission and EEOC from exercising their statutory authority to seek individual relief, then the public's power to remedy discrimination has been significantly curtailed. By insisting on such agreements, the very groups from whom protection was guaranteed can severely limit public oversight. Nor would that limit on oversight be limited to employment. Hotel chains could

avoid review by including an agreement to arbitrate in every registration form. Every lease could include an agreement to arbitrate. To maintain the public's authority, this Court should grant the petition, reverse the decision of the Eighth Circuit, and reaffirm that public agencies such as the Commission and EEOC are not the proxies of individual victims but are instead free to protect the public's interest in preventing employment discrimination.[11]

2. The Court of Appeals ignored a second set of cases when it held that the Commission, though itself never a party or privy to arbitration, was a representative of the employee, insofar as individual relief is sought, and so bound by the arbitral decision. The decisions of this Court do not support the notion that a public agency such as the Commission represents private interests even when it seeks relief for an individual victim of discrimination.

In this regard, the most notable precedent is *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980). There this Court held that EEOC claims for individual back pay were not representative actions under Rule 23 of the Federal Rules of Civil Procedure. The fact th individual victims could sue in their own right "suggest[ed] that EEOC is not merely a proxy for the victims of discrimination." 446 U.S. at 326. Rather, "[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific

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[11] Of course, as a federal agency, EEOC's authority could be so limited by Congress. But even had Congress intended to limit state agencies such as the Commission, its power to do so under the Commerce Clause would be questionable. *Alden v. Maine*, 527 U.S. 706 (1999); *College Savings Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999).

individuals, it acts also to vindicate the public interest in preventing employment discrimination." 446 U.S. at 326.

Like the EEOC, the Commission is a public body furthering a strong public interest. It is charged with eliminating and preventing discrimination because of "race, color, religion, national origin, ancestry, sex, age as it relates to employment, disability, or familial status as it relates to housing." Mo. Rev. Stat. §213.030.1(1). An individual victim of discrimination is not authorized to waive the authority of the Commission. Neither is he authorized to represent the interests of the Commission. As a result, neither an agreement to arbitrate a dispute, nor the actual arbitration itself, should divest the Commission of its statutory powers and duties.

A concern leading to this Court's conclusion in *Gardner-Denver* was the union's control over the presentation of the grievance under the collective bargaining agreement. The interests of the union and the employee may not always be harmonious. 415 U.S. at 58 n. 19. Similarly, in the instant case, the employee has exclusive control over the presentation of his claim during arbitration. But in a hearing under Missouri law, the Commission is required to be a party and is represented by either the Attorney General or a Commission staff attorney. Mo. Rev. Stat. § 213.075.7. Although the interests of an aggrieved employee and the Commission may be parallel, the public's interest in preventing and remedying racial discrimination should not be thwarted by an individual employee's litigation which the Commission cannot control, nor even influence.

## CONCLUSION

For the reasons stated above, the Court should grant the petition for writ of *certiorari*, and either summarily reverse the court of appeals' holding that it had subject matter jurisdiction, or set this matter for briefing and argument, instead of or alongside *Waffle House*.

Respectfully submitted,

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